IN THE IOWA DISTRICT COURT IN AND FOR DUBUQUE COUNTY

STEVE KUHLE AS FRATERNAL ORDER OF EAGLES #568, **Petitioner,** **v.** **IOWA CIVIL RIGHTS COMMISSION,** **Respondent,** **And** **PATRICIA KELLY AND MICHAEL FISHNICK,** **Intervenors.**	**Case No. 01311 CVCV106156** **RULING**

I. INTRODUCTION

Petitioner filed for Judicial Review on May 9, 2017. The matter came before the Court for hearing on the Intervenors' Motion to Dismiss on July 28, 2017. The Motion to Dismiss was denied. Petitioner filed his Brief on October 10, 2017. The Respondent and Intervenors both filed their respective Briefs on November 9, 2017.

II. PROCEDURAL HISTORY

Intervenors filed complaints with the Iowa Civil Rights Commission alleging their former employer, Dubuque Association No. 568 of the Fraternal Order of Eagles, discriminated against them on the basis of age. (Cert. Rec. at pg. 695-711). Following the investigation, the Commission initiated a contested case proceeding against Petitioner, which took place on March 10-11, 2015, before the Administrative Law Judge (ALJ). The ALJ found in favor of the Commission and issued a Proposed Decision on September 2, 2015. (Cert. Rec. at pg. 234-256).

Petitioner appealed the Proposed Decision on October 6, 2015. (Cert. Rec. at pg. 163-168). The Commission and Intervenors moved to dismiss the appeal as untimely on October 22, 2015, and October 26, 2015, respectively. (Cert. Rec. at pg. 169-172, 173-174). The Iowa Civil Rights Commission denied the motions to dismiss on March 4, 2016. (Cert. Rec. at pg. 179-186). The Iowa Civil Rights Commission held a hearing on Petitioner's appeal on May 13, 2016. (Cert. Rec. at pg. 187). The Commission issued an order for remand on June 3, 2016. (Cert. Rec. at pg. 21-22).

The ALJ held a hearing regarding remand on September 13, 2016, and issued a Supplemental Proposed Decision in the Commission's favor on November 21, 2016. (Cert. Rec. at pg. 412-425). Petitioner appealed the Supplemental Proposed Decision on December 19, 2016. (Cert. Rec. at pg. 39-44). The Commission filed its Final Order on April 10, 2017. (Cert. Rec. at pg. 1-2) (the decision is dated April 6, 2017, but was served April 10, 2017). The Commission's Final Order determined that Petitioner unlawfully discriminated against Intervenors due to their ages and awarded damages. Petitioner filed this action for judicial review from the Commission's final order.

III. STANDARD OF REVIEW

Judicial Review of a contested proceeding is to correct errors of law. Iowa Code § 17A.19. The Court's review of an agency finding is at law and not de novo. *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192, 193 (Iowa 1984). The Court will uphold the agency's action if it is supported by "substantial evidence in the record made before the agency when that record is viewed as a whole" Iowa Code § 17A.19(8)(f).

"Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1).

> Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. Conversely, evidence is not insubstantial merely because it would have supported contrary inferences. Nor is evidence insubstantial because of the possibility of drawing two inconsistent conclusions from it. The ultimate question is not whether the evidence supports a different finding but whether the evidence supports the findings actually made. *Reed v. Iowa Dep't of Transp*., 478 N.W.2d 844, 846 (Iowa 1991).

An agency's findings of fact are binding on appeal unless a contrary result is deemed as a matter of law. *UNI-United Facility v. Iowa Pub. Employment Relations Bd*., 545 N.W.2d 274, 278 (Iowa 1996). The Court shall give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law within the discretion of the agency. Iowa Code Section 17A.11(c). An agency's application of law to the facts can only be reversed if determined that such an application was "irrational, illogical, or wholly unjustifiable." Iowa Code Section 17A.19(10)(m).

The party challenging the agency's action bears the burden of proof. *Winnebago Indus. v. Haverly*, 727 N.W.2d 567, 571 (Iowa 2006). The burden of proof is by a preponderance of the evidence. *Sahu v. Iowa Bd. of Medical Examiners*, 537 N.W.2d 674 (Iowa 1995).

IV. STATEMENT OF THE FACTS

The facts of this case are restated numerous times in the parties' briefs and multiple decisions on appeal. The basic facts are uncontested.[1]

Petitioner is a membership organization run by a board of trustees. As one of its functions, Petitioner operates a bar or "social room." Petitioner employs bartenders, a bar manager, and at least one cook to work within the bar. Until fired, then 66-year-old Michael Fishnick and then 78-year-old Patricia Kelly worked in Petitioner's bar.

Fishnick began working for Petitioner in 2002 as a bartender, and was later promoted to bar manager. Kelly began working for Petitioner in 1997 and worked as a bartender during her entire period of employment. Both Fishnick and Kelly regularly worked the same scheduled hours week to week. Steven Kuhle is a trustee for Petitioner and he supervised the bartenders.

Witness Melody Barry, an Eagles ladies' auxiliary member, testified that in 2013 she heard Kuhle talking to another trustee about needing younger bartenders and "eye candy." Another trustee, Paul Radabaugh, testified that he had heard a trustee make comments about bringing in "eye candy" to work at the bar. Witness Susan Kline, an officer of the Eagles ladies' auxiliary, testified she heard Kuhle make comments about Kelly slowing down, as well as comments about wanting younger bartenders in the bar as "eye candy."

On February 9, 2013, Fishnick arrived to work a special anniversary event at the bar. Kuhle told Fishnick that the couple had specifically requested a female bartender for the event, and that Fishnick could work in the back room. Fishnick had never heard of anyone specifically requesting a female bartender at any time during his employment, but showed up to the event as scheduled. When he arrived, Kuhle's girlfriend, Jane Noble, was at the front bar. When Fishnick

[1] The recitation of the facts was pulled from the Respondent and Intervenors' Briefs, which cite the Administrative Law Judge's Proposed Decision, contained within the Certified Record, pages 234-256.

went to the back bar, he discovered another employee already working that bar. That employee, a male, told Fishnick he had been hired to work the back bar. At that time, the bar only had 6-8 patrons. Because there was no place for him to work, and he did not think it made sense to get paid to stand around, Fishnick went home. The following Monday, Fishnick returned to work as usual. He met with the trustees to explain why he had left the event, explaining that both bars had staff. Fishnick then worked the rest of the week without incident. The next week, Fishnick was told the trustees had voted to terminate his employment.

During the same meeting in which the trustees voted to terminate Fishnick's employment, they also voted to change Kelly's long-standing regular schedule. Kelly's schedule was reduced from daytime hours to three nights per week, which would require her to work as late as 2:00 a.m. Not only would Kelly not be able to pay her bills with the reduced schedule, but it was common knowledge that she preferred to not be out alone at night or climb the steps to her house in the dark. When Kuhle told Kelly the new schedule, she asked him if he was too chicken to fire her and was attempting to force her to quit. Kuhle simply shrugged his shoulders in response. Kelly did not return to work, and had her daughter call and ask for her old hours back. The bartender who answered the phone claimed that Kelly had retired.

During this same period, Kuhle hired Jamie Fransen, a 27-year-old female. Although Kuhle claims the entire board of trustees voted on the hire, the vote is not reflected in any meeting minutes, and Trustee Radabaugh denied any involvement in hiring Fransen. Fransen introduced herself to both Fishnick and Kelly as the new full-time bartender. Both found this odd, as no employee had enough hours to be considered full-time. Fransen worked an average of

17.5 hours per week initially, and she then worked approximately 40 hours per week after Fishnick and Kelly were gone.

Fishnick, Kelly, and witness Robert Baker (bar patron), testified that Fransen wore clothing that revealed her breasts. Baker testified Fransen got the attention of the men sitting at the bar when she leaned over. Other testimony suggested that Fransen did not always wear underwear, and that she wore revealing clothing to expose her breasts. Fishnick and Trustee Radabaugh testified that three other female bartenders in their mid-20s were hired after Fransen.

Kuhle maintains that the trustees terminated Fishnick (by a 3-2 vote) for his failure to stay at the anniversary event. Kuhle further maintains that the trustees changed Kelly's hours to nights to cover Fishnick's termination. Kuhle had no valid answer for why Kelly could not keep her regular day schedule when Fransen could take the evening hours. Kuhle testified that Kelly was slowing down. However, this seems contradictory to placing her on the evening hours, given that the evening shift was busier than the day shift. Prior to their terminations, neither Fishnick nor Kelly had received negative complaints from either patrons or trustees regarding their work performance.

V. ISSUES ON APPEAL

Reviewing the Petition and Petitioner's Brief, it is difficult to determine exactly what issues are appealed. There appears to be three main arguments from Petitioner: 1) the correct party was not served; 2) volunteer immunity of a non-profit organization; and 3) the Intervenors were at-will employees that could be terminated for any reason.

A. THE CORRECT PARTY WAS GIVEN PROPER NOTICE OF THIS PROCEEDING.

Petitioner argues that the agency has substituted several names into the record as liable parties without justification, and relief is requested on this ground. Based on the evidence presented throughout the entirety of these proceedings, it is difficult to determine the Petitioner's official legal name. The official legal name appears to be "Dubuque Aerie No. 563 of the Fraternal Order of Eagles." Petitioner, by its own admission, has referred to itself in the following ways: "Dubuque Fraternal Order of Eagles #568," "Dubuque Fraternal Order of Eagles #568," "Fraternal Order of Eagles 568," "Fraternal Order of Eagles 568 Aerie," and "F.O.E. 568 Eagles." There is no consistency in the name even across documents including two mortgages, a promissory note, a quitclaim deed, a release of easement and bank statements.

Originally, the contested case was filed against "Dubuque Fraternal Order of Eagles #568" and Steve Kuhle as two separate respondents. (Cert. Rec. at pg. 234). This name was used by the Intervenors because it was the name that appeared on their employment pay stubs. The Dubuque branch of the Fraternal Order received notice of the complaint and fully participated in every state of the administrative process. (Cert. Rec. at pg. 6-7). The same attorney has represented both the organization and Kuhle throughout the entire process.

Iowa Rule of Civil Procedure 1.402(5) addresses amendments to pleadings. It allows correcting the name of a party if the party was served within the statute of limitations period under a similar but different name. If a pleading that has gone unchallenged until after the trial, it will be construed as liberally as possible, and aided by every implication and intendment, no matter how remote, whereas if the attack had been sooner made, it would not be so liberally construed. *Wilson v. Corbin*, 41 N.W.2d 702 (Iowa 1950).

Petitioner has appeared through counsel throughout the entire contested case proceeding and never raised the issue of being improperly named, including in its post-hearing brief. Aside from the testimony of a single witness at the remand hearing, Petitioner was unable to point to a single instance of its attorney or witnesses ever referring to it by its proper legal name during the hearings or in its filings. The record is clear that the proper party showed up and defended itself against the claims made by the Intervenors regarding improper discharge of employment.

B. INDIVIDUAL VOLUNTEERS OF A NON-PROFIT ORGANIZATION MAY BE ENTITLED TO IMMUNITY, BUT THAT DOES NOT ABSOLVE THE ORGANIZATION AS A WHOLE.

Petitioner argues under Iowa Code Chapter 504.832 that the volunteers of a non-profit organization cannot be liable unless the standards of liability are such that the challenged conduct consisted of, or was the result of, an action not in good faith, or that the decision was made where it was believed not to be in the interest of the corporation, and alternatively that the directors were not informed to an extent reasonably believed appropriate in the circumstances. Petitioner asserts that the standards for volunteers of a non-profit organization were followed and that they acted in "good faith" and "in a manner reasonably believed to be in the best interest of the corporation." (Petitioner's Brief, pg. 1).

In certain instances, a non-profit organization's volunteers do not face liability for their illegal acts. Iowa Code Section 504.90 provides that:

> 1. Except as otherwise provided in this chapter, a director, officer, employee or member of a corporation is not liable for the corporations' debts or obligations and a director, officer, member or other volunteer is not personally liable in that capacity to any person for any action taken or failure to take any action in the discharge of a person's duties except liability for any of the following:

a. The amount of any financial benefit to which the person is not entitled.
b. An intentional infliction of harm on the corporation or the members.
c. A violation of section 504.835.
d. An intentional violation of criminal law.

The Final Order of the Administrative Law Judge determined that Kuhle did not face individual liability for his discriminatory actions as a trustee of the Eagles Club under Iowa Code Section 504.901. Petitioner argues that it is inconsistent to find that the individual has immunity but not the organization. Petitioner has provided no authority for this claim and only argues that such a holding would "render it impossible for any volunteer to understand, how they could volunteer, act in a reasonable manner, and then they will be found to be immune, but the organization must pay for the same reasonable action." (Petitioner's Brief).

Iowa Code Chapter 504 does not provide immunity for non-profit organizations as a whole, but only for individual volunteers in specified circumstances. The Iowa Civil Rights Commission found Kuhle was entitled to this individual statutory immunity. No evidence or testimony supports the argument that this was unreasonable, arbitrary, capricious, or an abuse of discretion as required under Iowa Code Chapter 17A. The organization still remains liable for its own wrongful or illegal acts, including age discrimination, absent evidence to the contrary.

C. AT-WILL EMPLOYEES MAY BE TERMINATED AT ANY TIME FOR ANY *LAWFUL* REASON.

Petitioner argues that the right of the employer to terminate at-will employees should be upheld. Petitioner maintains that the Intervenors were terminated for a proper reason: that the employees did not wish to work the hours they were assigned.

Under the Iowa Civil Rights Act of 1965,

1. It shall be an unfair or discriminatory practice for any:
    a. Person to refuse to hire, accept, register classify or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such applicant or employee, unless based upon the nature of the occupation. (Iowa Code Section 216.6(1)(2013).

In regards to Fishnick, the Commission alleges a single count of disparate treatment, asserting that Petitioner terminated his employment due to "his age, sex, and/or a combination of his age and sex." The claims the Commission alleges on behalf of Kelly are premised on Petitioner having discriminated against her on the basis of her age.

Discrimination can be established through either direct or indirect evidence. Direct evidence may include remarks by a decision maker that show a specific link between a discriminatory basis and the adverse employment action, sufficient to support a finding that the bias motivated the action. *Doucette v. Morrison County, Minn.*, 763 F.3d 978, 985-86 (8th Cir. 2014). Petitioner seems to argue that because there is no obvious, direct evidence of age discrimination, discrimination did not occur.

However, where there is evidence of indirect evidence of discrimination, the claim is analyzed under the *McDonnell Douglas* burden-shifting framework. *Tusing v. Des Moines Independent Community School Dist*., 639 F.3d 507, 515 (8th Cir. 2011). Under this framework, the Commission has the initial burden to establish a prima facie case of discrimination. Once it has done so, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for the employment action. If they do so, the burden shifts back to the Commission to

demonstrate by a preponderance of the evidence that the stated non-discriminatory reason was merely a pretext for discrimination. *Id*.

In order to establish a prima facie case of age discrimination, the claimant must typically prove that: 1) he/she was in the protected class (over age 40), 2) he/she was qualified for the position, 3) he/she was terminated or suffered adverse employment action, and 4) he/she was replaced by an individual who was substantially younger. *Haigh v. Gelita USA, Inc*., 532 F.3d 464, 468 (8th Cir. 2011) (*citing Roeben v. BG Excelsior Ltd. P'ship*, 545 F.3d 639, 542 (8th Cir. 2008)). No one disputes that both Intervenors were over the age of 40. No one disputes that both Intervenors were qualified for their position. There is no denial that Fishnick was terminated.

Petitioner asserts that Kelly was not terminated, nor did she suffer adverse employment action; but rather she chose to quit. The evidence presented establishes that Kelly worked a standard 28 hours per week with her daytime schedule. With these hours she was able to pay her bills and live in her downtown home. The changing of her schedule would have resulted in a reduction down to 14 hours per week. (Cert. Rec. at pg. 307). Under these circumstances, Kelly did suffer an adverse employment action. Her guaranteed weekly hours were reduced by almost half, even assuming she could get a couple extra hours on Saturday nights if the bar stayed open late.

Finally, the record is clear that both Intervenors were replaced by individuals who were substantially younger. Fransen was a young woman that started her employment right before Intervenors were fired. She wore inappropriate clothing that exposed her breasts and allowed patrons to recognize when she wasn't wearing underwear. There were multiple reports of

statements about wanting some "eye candy" in the bar. There was testimony that after the Intervenors were no longer employed, three other women in their mid-20s were hired.

The Intervenors established a prima facie case that they suffered discrimination based on their age. The burden then shifted to Petitioner to articulate a legitimate non-discriminatory reason for the employment action. Kuhle was only able to say that Fishnick was terminated for not staying at an event that was fully staffed, and that Kelly wasn't fired because she walked out after her hours were changed. Even giving Petitioner the benefit of the doubt for the reasons offered, based on the evidence presented, these reasons are weak and appear to be nothing more than a pretext for wanting younger women in the bar to bring in more clientele.

VI. CONCLUSION

Petitioner bears the burden of proof to establish that the agency's action was not supported by substantial evidence within the record. This burden was not met. Petitioner could not establish a legitimate, non-pretexual reason for terminating Fishnick and Kelly. There is substantial evidence in the record that Petitioner discriminated against Fishnick and Kelly because of their ages. The organization is not entitled to any sort of immunity. Petitioner was served with notice of this action from the beginning, and the correct party appeared at all levels of the proceeding. Nothing in the record indicates that the agency's application of law to the facts was irrational, illogical, or wholly unjustifiable.

IT IS THEREFORE ORDERED that the agency's final decision is AFFIRMED. Costs shall be assessed against Petitioner.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV106156	KUHLE V IOWA CIVIL RIGHTS COMMISSION

So Ordered

Thomas A. Bitter, District Court Judge,
First Judicial District of Iowa